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Tariff Authority for Major Ports

NOTIFICATION

In exercise of the powers conferred by Sections 48 and 49 of the Major Port Trusts Act, 1963 (38 of 1963), the Tariff Authority for Major Ports hereby disposes of an application submitted by the NSICT for a review of this Authority's Order dated 7 November 2000 on revision of its Scale of Rates relating to container handling charges as in the Order appended hereto.

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Tariff Authority for Major Ports

Case No.TAMP/27/2001-JNPT

Nhava Sheva International Container Terminal Limited (NSICT) - - - Applicant

O R D E R

(Passed on this 20th day of September 2001)

This Authority passed an Order on 7 November 2000 disposing of the proposal of the Nhava Sheva International Container Terminal Limited (NSICT) for revision of its Scale of Rates relating to container handling charges.

2. NSICT has now submitted an application for a review of the Order on the following main issues:

(i). Allowability of Technical Service Fees.

(ii). Inclusion of tax as a cost element for determining tariff.

(iii). Return on capital employed

(iv). Basis of allowing foreign exchange losses.

(v). Application of uniform basis of tariff for different operators.

3.1. The NSICT has stated that it had commissioned M/s. Arthur Andersen to study the pertinent issues and advise it. The NSICT has also forwarded a copy of the report submitted to it by M/s. Arthur Andersen. Initially, the NSICT had

requested to maintain confidentiality of the report submitted by M/s. Arthur Andersen and not to circulate this report without written consent of the NSICT and M/s. Arthur Andersen.

3.2. Since the NSICT had requested to maintain confidentiality of the Arthur Andersen Report, it was informed that the Report would be taken into consideration only if the stipulation about maintaining confidentiality was withdrawn. This has become necessary since the analysis of the NSICT application in this case has to essentially deal with the views expressed in that Report if it is taken on record for consideration. The NSICT has subsequently informed that it withdraws the confidentiality condition attached to that Report.

4. This petition has been registered as a 'review' case. The issues presented for reconsideration are related to the approach adopted by the Authority in determining the tariff increase. Since no new issues have been raised, the review application was not forwarded to the concerned users for comments.

5.1. On a preliminary consideration of the matter, this Authority decided that it would not be necessary to provide an opportunity for the NSICT to set up a Presentation by M/s. Arthur Andersen of their analysis of the impugned Order. The avertment of the NSICT that an opportunity of hearing was not given to the Private Terminals to offer their views before adopting a new approach to Return on Investment in their cases was, however, considered in particular. It was decided that the procedural lapse pointed out by the NSICT might be rectified by setting up a joint hearing on the limited issue of Return on Investment whereafter the case could be finally disposed of duly taking into account the arguments advanced in the proposed hearing. It was also decided that the opportunity available would be utilised for developing a common approach to tariff cases of all Private Terminals and not just with reference to the NSICT case under consideration.

5.2. Pursuant to the decisions mentioned above, a joint hearing was fixed in the matter relating to Return on Investment allowed to Private Terminals at the MBPT premises on 3 September 2001. Apart from the NSICT, the following organisations/representative bodies of port users and trade were also invited to participate in the hearing:

(1). PSA SICAL Terminal Limited.

(2). Chennai Container Terminals Limited.

(3). Jawaharlal Nehru Port Trust.

(4). Tuticorin Port Trust.

(5). Mormugao Port Trust.

(6). Chennai Port Trust.

(7). ABG Heavy Industries Ltd.

(8). Indian National Shipowners' Association.

(9). Container Shipping Lines Association.

(10). Federation of Freight Forwarders' Association in India.

(11). Federation of Association of Stevedores.

(12). Confederation of Indian Industry.

(13). Federation of Indian Chamber of Commerce & Industry.

(14). Indian Merchant Chamber.

6. At the joint hearing, the following submissions were made:

The Nhava Sheva International Container Terminal Limited (NSICT

(also representing the Chennai Container Terminal Limited.)

(i). The BOT agreements have stringent requirements which a Private Operator must meet.

(ii). Please go by the Return on Capital Employed method instead of adopting Cost of different Sources of Capital.

(iii). Pre-tax Return is not adequate if tax liability is to be absorbed.

(iv). Our Parent Company has guaranteed loans by absorbing the risks. It has not passed on the risk to the NSICT. The Return on Equity shall, therefore, be more.

(v). Debt enjoys tax benefits. Equity does not. Please consider the differentiation.

(vi). Foreign Exchange losses have not been considered.

(vii). How will we get a return of 20% on unutilised capital elsewhere?

(viii). The CSLA'S observations about post-Panamax Cranes are not consistent with what they say to us. The JNPT is planning to deepen the channel. We have to look ahead.

(ix). Equity, debt and reserves must get return.

(x). The CSLA has confused between the IRR and Return on Capital. IRR is for choosing between projects. ROCE is for a particular project.

(xi). Please do not have a rigid debt-equity ratio. A separate assessment with respect to each project is to be made.

(xii). All infrastructure sector projects have the same fundamentals. They need large investments and returns are slow in coming. There is therefore no guarantee of returns. There has to be a guarantee of return. Otherwise, why will anyone invest?

(xiii). Subsequent introduction of MAT has altered the position about tax holiday.

(xiv). Depreciation of foreign equity over the life of the BOT concession has not been considered by the TAMP.

The Container Shipping Lines Association (CSLA)

(i). It is good that the TAMP goes into these details.

(ii). Please do not compare Private Terminals with Major Port Trusts. Even the return of 20% allowed to Private Terminals is high.

(iii). A 20% return may be reasonable by 10/15 years of operation. To start with, it must be less.

(iv). The model adopted in the NSICT case is liberal in giving a guaranteed tariff and a liberal return. It is charitable to the Terminal.

(v). Please do away with the 'Cost-Plus' model. It is an uneconomic and un-commercial approach. Please do not isolate Private Terminal from commercial risks. This will work against efficiency.

(vi). The NSICT's argument about comparing it with the Telecom Sector is not valid. Telecom is a high-risk technology; Ports are not in that category.

(vii). Foreign exchange loss as a pass-through in tariff amounts to dollarisation

(viii). The NSICT will ask for payment for efficiency. They have come in because of their international standing. They shall not charge extra for that.

Mumbai and Nhava-Sheva Ship-Agents' Association (MANSA)

(i). Free Reserves must also be considered along with equity.

(ii). Major Port Trusts have no profit motive. But, Private Terminals have to pay dividend. So, consider them differently.

(iii). Under Section 80-J of the Income Tax Act, 15% of Capital Employed was deducted. The Calcutta High Court has amended this provision to redefine Capital Employed to exclude long-term loans from the definition of Capital Employed.

(iv). Debt-Equity ratio of 1:1 is very liberal. It appears that 2:1 may be more realistic.

Federation of Freight Forwarders' Association in India (FFFAI)

(i). Comparison between a Major Port Trust and a Private Terminal is not valid at all. They are incomparable.

(ii). Debt-Equity Ratio of 1:1 is very attractive.

(iii). Why should reserve be considered for return. It must be deducted.

(iv). Foreign exchange loss is a normal commercial risk.

Indian Merchant Chamber (IMC)

(i). The objectives of Major Port Trusts and Private Terminals are different. They cannot be compared.

(ii). Let Port pricing promote efficient service at cheaper cost.

(iii). Trade risks cannot be grounds for increasing tariffs. The NSICT has come in knowing fully well the trade risks involved.

(iv). Installed capacity has to be more than the demand. There cannot be a rigid match between the demand and supply.

(v). The Private Terminals may give several benefits to Lines because of their efficiency. Nothing of that is passed on to the Trade. How does an efficient Private Terminal benefits the Trade in this situation?

(vi). Uninhibited competition must be restricted. Huge investments already made must be protected to fetch adequate returns.

Jawaharlal Nehru Port Trust

(i). The JNPT will be corporatised very soon. We will be commercial and we also need profit. We wish to maximise our ROCE.

7.1. The PSA SICAL reported its inability to participate in the joint hearing due to some crisis at its Tuticorin Terminal. Its request for filing a written submission within 10 days was allowed. Likewise, the request of the NSICT, CSLA, MANSA and ABG for time to file further written submissions was also granted. The NSICT also circulated a copy of the Arthur Andersen Report to the CSLA, MANSA, IMC and JNPT.

7.2. The salient points made in the written submissions filed by these organisations are summarised below:

I. The Nhava Sheva International Container Terminal Ltd

(i). The Authority shall have confidence in the Balance Sheet Management of the private investors since none of the investors will be assuming a position that will harm the Company especially since global investors are involved.

(ii). What the Authority must decide is if the capital employed is adequately reflective of capacity utilisation and if it is so then allow the prescribed return on capital employed to the Company.

(iii). There are a number of benchmarks that can be used to determine a return. One of the best benchmarks on which return can be decided is Capital Employed for this is always adjusted year over year to reflect new investments and reduction in the existing investments. The Authority has rightly chosen this benchmark in the case of Port Trusts and should continue with this benchmark.

(iv). The Authority has adopted 20% Return on Equity as a benchmark. If there is a tax holiday, the net return to foreign investor is only 9.08%. If there is no tax holiday, then the investor earns a return of only 4.5%.

(v). The Authority should adopt a Return on Capital Employed in the region of 20% to 25% to Private Terminals.

(vi). The question arose is whether the company operating a BOT is entitled to a Development Reserve and a Replacement Reserve. In the case of Companies under BOT projects these Reserves are crucial to the survival of the Companies. At the end of the License period these Companies hand over all their assets free of cost to the Port Trust and meet all employee liabilities and settlements as these employees are not absorbed by the Port. The Port gets equipment, which has a life of 20 years after being used for 7-10 years absolutely free. In such a case astute financial planning requires a company to have a reserve in place that will enable it to meet the heavy capital expenditure it is required to write off over less than half the useful life of assets. If double the depreciation is loaded (because the useful life for the BOT operator is limited) the tariffs of the operator will be commercially unviable thereby causing great financial loss. Thus, these stringent liabilities that the BOT operator faces must be spread out over a larger period so as to ensure the commercial viability of the project. The Authority must, therefore, consider allowing a percentage of the return earned as a reserve for development and replacement.

(vii). The question arose whether debt : equity ratio of 1:1 is an appropriate ratio. The Authority must consider capital employed as the base for the return as rightly chosen by the Authority in the case of Port Trusts. In such a scenario the debt : equity ratio does not become applicable. Further, whilst shareholder funds are normally constant on account of no buy back of equity, debt is repaid based on the repayment schedule. In such a case debt will continue to reduce and thus the equity component will always increase in the ratio and when

all debt is repaid only the equity component will remain. The Authority must allow the private investor the freedom to decide on the financing pattern. It will not be detrimental to the interests of the company.

II. The PSA SICAL Limited

(i). The TAMP has fixed a norm for debt to equity ratio as 1:1. The debt equity ratio may be different for different operators depending upon the private promoters' commercial requirement and the capability to leverage his funds. Hence, TAMP need not fix a norm for debt-equity.

(ii). The TAMP has used capacity utilization as one of the factor of consideration. In the case of private terminals, adding new capacity is normally volume driven. Hence, the TAMP may allow flexibility while reviewing the business models of private operators.

(iii). The TAMP has used 'pre-tax return' instead of 'post-tax return' as an indicator. If the tax payable is accounted for, the return on shareholder' funds will be reduced to as low as 14%, depending on the provisions of tax holiday. This is definitely inadequate to cover the business risk

(iv). In fact, the 20% return on shareholders' funds and the interest on debt are inadequate to have sustained business operations.

(v). In the long run, TAMP shall move away from the cost plus model to a competitive tariff model, especially for efficiently operated terminals. The cost-plus model is a disincentive for private operators with efficient operation and high asset utilization.

III. The ABG Heavy Industries Ltd.

(i). Each terminal operator must be allowed to decide himself the combination of debt and equity in the capital structuring of the project. For the purpose of tariff fixation, it will not matter whether financing is done by means of debt or by raising equity. The entire cost of the project shall be reckoned as capital employed and 20% cost of capital should be considered for tariff fixation.

(ii). Since the equity has no security of assets and is essentially fraught with uncertainties of risks and rewards, a return of 20% on the equity component of the capital employed shall be permitted over and above the cost of capital.

(iii). If depreciation on straight-line method is adopted, this amount will be comparatively less in the first few years as against the amount of loan repayments. In our view, therefore, depreciation must be considered on written down value method whereby a larger amount of depreciation is

available in the first few years, which will match with the corresponding amounts of repayment of principal.

(iv). Whereas the interest on the debt is tax-deductible expenditure, return on equity is accounted from post-tax profits only. Therefore, an element of tax before return on equity needs to be factored in the tariff. This is particularly relevant from the point of limited applicability of tax holiday deductions under section 80 IA and tax on dividend distributions applicable to companies which are not applicable in the case of Port Trusts.

(v). On the subject of capacity utilisation, what must be considered for tariff fixation is what is practically feasible in different phases of the life of the Port. Therefore, in the initial and formative years of the Project, capacity utilisation must be taken at not more that 50% of the rated capacity which can be progressively increased by 10% every five years until it reaches 90% capacity utilisation.

IV. <u>The Container Shipping Lines Association</u>

(i). The CSLA is concerned that whatever earning benchmark is established, as a result of the lack of choice available, that benchmark level becomes the norm. The terminal operator is thus effectively isolated from commercial risk (unless traffic flows fall away significantly, which seem unlikely) and is thus in the happy position of receiving a virtually guaranteed return. The CSLA prefers a regime such as that described by Arthur Andersen in paragraph 3.01 of its report which states, "In summary, while a uniform basis of rate determination is applied, certain parameters can be negotiated within pre-determined levels". There is no reason why the level fixed must become the basis for all pricing. Private Terminals shall be able to negotiate lower rates.

(ii). Our investigation into the financials of NSICT (audited accounts for 9 months period ended 31/12/2000) reveals that the NSICT is currently earning (on an annualised basis) approximately 26% on shareholders' equity (where return=profit after tax+ technical service fees; royalty paid; and, shareholders equity = share capital + free reserves). This quantum of return on investment is considerably higher in comparison to the returns that will normally accrue to any capital-intensive industry. Hence, we fail to see why the NSICT is seeking a still higher return on its investment.

(iii). Return on shareholders' equity is a sensible yardstick for regulating prices, where return shall be equal to 'Profit after tax' (adjusted for any royalty / technical service fee paid to any party) and Shareholders' equity should include Share Capital + Free Reserves & Surplus.

(iv). The contention that private terminals and port trusts shall have the same regulation regime is reasonable, provided that they have the same obligations. It has to be recognised that Port Trusts have,by law, social and operational obligations which may not be the same, as for example, as the NSICT's obligations. The regime too must be equitable and market related. The returns allowed to the port trusts are too high. These need to be adjusted downwards and only then the same regime applied to both private and state terminals, subject to the observations made above. The return shall be limited to the Government lending rate to the Ports (which in the current year is 13%). No extra allowance shall be permitted for any other 'reserves'. This will mean that once the returns are higher than 13%, there will not be a need for the operator to approach the TAMP for an increase in tariff.

(v). It is felt that the use of 'cost-plus' pricing mechanisms is entirely wrong. This places no onus upon terminals to be efficient. This will not serve the trade, or lines, or the country satisfactorily and will perpetuate commercial complacency and inefficiency.

(vi). The NSICT and JNPT both face foreign currency debt, which can be forecast and anticipated. The Indian rupee has not been devalued exceptionally and, therefore, the exchange losses can be considered as the operators' commercial risk. It is also interesting that the TAMP has ruled against dollar denominated tariffs (except for certain cost categories). This proposal, removing as it does all the currency risk, is simply another means of achieving the same effect as a dollar denominated tariff.

(vii). It is inappropriate to make comparisons with the telecommunications and power generation businesses. The former is a high risk, new technology business. Products have a relatively short "shelf life" and a high rate of return may, therefore, be justified. To equate this with the container terminal business which is old and well tried technology and is not a new industry, is inappropriate. Parallels with the power generation business are also inappropriate as this involves relatively few contracting parties, many of which are State organisations.

(viii). It seems peculiar that the NSICT have apparently got their costings so wrong as to need a further change in the regulatory regime when they had a tariff approval in 1998 which presumably gave an adequate return, required a further change one year later, and now require further adjustments. No case has been made that costs have increased or other circumstances changed. Arthur Andersen say, rightly, that if costs increase, there must be a mechanism to recover them, provided, of course, that a justifying case is made so to do.

(ix). Any increase granted will result in increased Terminal Handling Charges. It is incorrect though to suggest a fundamental failure here by the lines to pass back efficiencies to the trade. This is now happening

by dint of the increased competition between lines which in turn is reducing freight rates, in the case of the European trade, dramatically, (1300 to 550 per TEU in 4 months). This competition would not have been possible without the efficiency of NSICT.

(x). The P&O Ports have expressed the view in the past that they have been required to install cranes of a capacity that cannot be fully exploited as a result of draft restrictions. It is unfair to the NSICT if they have to carry the capital cost of such equipment. Equally, it is inappropriate for the lines and the trade to have to bear the cost of this equipment if indeed its full potential is unrealisable. It will be instructive to understand the utilisation of the NSICT equipment and the cranes in particular, to be sure that the amount of equipment is commensurate with the throughputs.

(xi) 95% of the share capital of the NSICT is held by the P&O Ports, who then provide 'technical services' to the NSICT, effectively itself, for which it charges a fee. This appears to be largely a mechanism to maximise the profit taken from the NSICT. Having said this, it is inarguable that a terminal will probably require additional management expertise in its early stages of development, and indeed some specialist advice may be required from time to time thereafter. To suggest, however, that such services are required in perpetuity, and at these levels of remuneration seems inappropriate. The levels of advice required will reduce as the terminal matures, and while the Lines are not privy to the workings of the consultancy market the structure of the fee seems peculiar. It is not clear why this will be based upon the US consumer price index. It is also not clear why there will be fixed and variable elements. If a TSF is to be paid it shall be based upon management time or some other more related measure. It will be helpful to be able to debate the list of services provided, much of the items seemingly being more in the province of the management of the company in discharging their normal responsibilities than the province of consultants.

V. <u>The Mumbai and Nhava-Sheva Ship- Agents' Association</u>

(i). The return shall always be measured in terms of the "capital invested" by the promoters. The tariff shall not cover the return on "capital employed" for a project, which the TAMP and Government have been providing 6% over and above the interest payable on "Long Term Loans".

(ii). While, in the case of port trusts, return on 'capital employed' is considered for fixing the tariff, whereas in the case of private operators, the TAMP must ensure adequate return on the 'capital invested' by the promoters, and also include its General / Free Reserve, which is defined as 'Shareholders' Fund' / `Net Worth'.

(iii). Admittedly, there is a discriminatory treatment for fixing tariff, by considering return on the capital invested by the promoters in the case of private ports and return on the capital employed in the case of port trusts, as there is a difference in the basic financial structure in the case of port trusts and private ports. Profits of private operators can be distributed as dividends, while there is no such distribution in the case of Port Trusts. As allowing return on "capital employed" to Port Trusts itself is questionable, it should not be extended to private port operators.

(iv). While Minimum Alternative Tax (MAT) has been made applicable to the NSICT, it has not been pointed out that under Section 80-IA, the deduction of 100% tax applicable to the NSICT is extended to 10 years, as against 5 years allowed earlier. Thus with frequent changes of provisions of incentives under the Income-Tax Act, it is advisable to consider return on pre-tax profit rather post-tax profit.

(v). Prior to introduction of dividend distribution tax, dividend income was taxable in the hands of the recipient. The normal rate of tax on such dividend income would have been 35 to 40% and was much higher earlier. By introducing the above provision in 1997, the company is required to pay 10% tax on the amount of dividend declared and the recipient of dividend is not taxed on such dividend income. Thus while the NSICT will have to pay tax on dividend declared, the recipient of dividend will not be taxed.

8.1. The joint hearing in this case was on the limited issue of 'return on capital employed'. But, many useful comments have been made by different parties even on other issues. These have been taken on record and retained for consideration separately, since, as earlier stated, the stated idea was to utilise the opportunity available for developing a common approach to tariff cases of all private terminals and not just with reference to the NSICT case under consideration.

8.2. Even on the limited issue of 'return on capital employed', it has to be recognised that the comments made have to be with reference to any 'error apparent on the face of the record' since the joint-hearing in respect of this case was about an application for 'review' of our Order. The comments that are relevant in this backdrop have been reckoned with in the context of our analyses recorded under each issue.

8.3. The remainder of the comments have also been retained for consideration separately either for refining the existing models or for developing new models.

8.4. The various issues agitated by the NSICT along with the advice given in the Arthur Andersen report and the arguments advanced at the joint hearing (on the limited issue of Return on investments) were analysed. With reference to the totality of information collected during the processing of this case, the following position emerges:

I. Technical Service Fees

The Authority's Order

(i). The BOT contract for development and operation of the container terminal has been awarded to the consortium lead by the P&O Australia based, *inter alia*, on the expertise and standing of the promoter. The NSICT was a later creation as envisaged in the concession agreement.

(ii). The Technical Service Fee (TSF) has no linkage with the service provided. It is essentially a fixed payment more in the nature of dividend payable to the promoter. Prescription of a variable technical service fee as a percentage of profit and the practice of grossing up of taxes reinforce this understanding.

(iii). No other similarly placed private terminal operator in any of the major ports has been following the practice of paying TSF to the main promoter

(iv). The BOT agreement has been awarded based on the expertise of the promoter and the promoter is expected to pass on the expertise to the Indian company floated under the respective concession agreement.

(v). The clearance stated to have been granted by the FIPB and the RBI can at best be seen as permissions to repatriate TSF payment while the propriety of such repatriation is not questioned, this payment cannot be recognised as a cost element for determination of tariff.

(vi). The TSF payment is definitely in the nature of a return on capital employed and needs to be treated as a part of the return.

NSICT's Comments

(i). The FIPB is not a remittance approval body. It approves such fees after proper application of mind. Incidentally, the FIPB comprises Secretary level officers from different ministries.

(ii). TSF is not a dividend mechanism. The NSICT and P&O Ports are two separate legal entities. One's service cannot be available free to the other.

(iii). If the stance taken by the TAMP is correct, then there is no difference between a financial investor and the investor who brings in technology.

(iv). No legislation (e.g. Companies Act) has such a payment be deemed as dividend or return on capital.

(v). TSF has approval of the Govt. of India.

(vi). Our agreement has since been revised. Now, it is not necessary to gross up the TSF for tax.

Comments of M/s. Arthur Andersen

(i). The other rate regulatory regimes in India do not specifically address the treatment of TSF payments. It may be inferred that the broad principles for allowing reasonable and justifiable business expenses in these regimes may apply to the treatment of TSF payment.

(ii). Under the provisions of the Income Tax Act, TSF payment and tax borne on such TSF payment can be claimed as deduction by an Indian Company. The Income Tax authorities, however, can disallow tax deduction on that portion of the expenses which they believe to be excessive or unreasonable having regard to the market value of such services, the benefit derived and the legitimate need of the business.

(iii). Approvals by the FIPB are based on negotiations and subjective analysis of various key factors. Negotiations with the FIPB are driven by business and commercial considerations, as well as benefits that accrue to the investor and the Indian economy.

(iv). Where TSF payments are made under a technical service agreement approved by the FIPB, it is unlikely that the Income Tax authorities will disallow deduction on the ground that the payments are excessive or unreasonable. If the TSF payments are allowed by the Income Tax authorities, they may be considered as reasonable and justifiable business expenses by regulators and allowed for inclusion in cost based tariffs.

Analysis

The observation of M/s. Arthur Andersen about admissibility of TSF payment by default in other regulated sectors is presumptive and hypothetical. What effectively emerges from the report is that none of the other Regulators has explicitly admitted TSF payment as a cost pass-through in tariff.

Merely because TSF is considered as an admissible business expense by the Income Tax Authorities and is approved by the FIPB, it is not binding on a Regulator to allow it as an item of cost for determining tariff. Each of these Authorities draws up its own parameters for scrutiny of issues falling under its respective jurisdiction. It is a well-known fact that the method of arriving at depreciation varies between the Companies Act and Income Tax Act. In the case of the NSICT (which is a registered Indian Company), this Authority has allowed depreciation as per the Companies Act norms for determining tariff increase. This approach adopted by this Authority cannot be said to bind the Income Tax Authorities to assess depreciation in the same manner. Likewise, the approach adopted by other Authorities need not always be the sole guiding factor for this Authority.

It is noteworthy that this Authority had not declared the TSF payment as improper or illegitimate. It has clearly been mentioned that the propriety of repatriation of TSF payment is not questioned. This Authority has only decided not to recognise this payment as a cost element for determination of tariff for detailed reasons given in its Order. If the NSICT does not agree with the stand taken by this Authority in this regard, it has to agitate this issue in some other appropriate forum. Since there is no error apparent on the face of the record, review of our Order insofar as the issue of technical service fee is not necessary.

Incidentally, the NSICT has stated that the TSF is not now grossed up for tax. It is a welcome change. Revision of agreement between the NSICT and P & O Ports to this effect does not, however, alter the character of this transaction and, hence, its treatment in tariff determination.

II. Minimum Alternate Tax and Dividend Distribution Tax

The Authority's Order

(i). There is no justification to consider the Dividend Distribution Tax as a cost element since it is in effect paid / payable on behalf of the shareholders and is akin to tax deduction at source.

(ii). The rates of tax are subject to periodic changes and the outflow on account of tax is a function of the profit to be earned by the company. That being so, estimation of the liability of MAT beforehand for tariff setting may pose problems.

(iii). It is appropriate to exclude the effect of taxation from net surplus estimation. If this is not done, adequate compensation by prescribing a higher pre-tax return on equity needs to be allowed.

(iv). The TRAI does not consider the effect of taxation on the profit of Operators for determination of tariffs.

NSICT's Comments

(i). Taxes are cost for the company when arriving at pricing decisions. The effect of taxation is always considered when fixing tariffs in all businesses.

(ii). The Dividend Distribution Tax is neither a tax deducted at source nor a tax paid on behalf of the shareholders. The incidence of tax is on the company making the distribution and not on its shareholders.

(iii). The Authority cannot ignore the fact that Major Port Trusts are not subject to payment of tax; but, the NSICT is liable to pay taxes.

(iv). The TRAI has not made any reference to disallow taxes. Its orders dealing with the subject are prior to imposition of these taxes. 20%

pre-tax return means 15.08% post-tax return to shareholders after a 10% transfer to reserves.

Comments of M/s. Arthur Andersen

(i). Under the provisions of the Income Tax Act, Dividend Distribution Tax is a tax cost for the company distributing the dividend for which credit cannot be claimed in India. As the recipient of the dividend is not entitled to claim credit for the DDT, it is not in the nature of the TDS by the company on behalf of the recipient.

Analysis

It is to be admitted that shareholders do not get credit for Dividend Distribution Tax (DDT) paid by the Company. They, however, do not pay any tax on the dividend received which they were paying before introduction of the DDT. In this context only it has been mentioned in our Order that the DDT is akin to Tax Deduction at Source (TDS). There is no confusion about payment of DDT being TDS. Only, such payment has to be recognised as shifting the incidence of tax from shareholders to the Company.

It is relevant here to point out that this Authority has allowed a pre-tax return on equity since taxes are not considered as cost pass-through in tariff.

The MANSA's observation about frequent changes in taxation is relevant and has already been recognised by this Authority. In this backdrop only, it was decided to allow a pre-tax return on equity.

The issue about admissibility of DDT and Minimum Alternate Tax may be relevant points for review; but, these issues had already been considered by this Authority in its Order dated 7 November 2000. The NSICT has not pointed out any errors apparent on the face of the record warranting a review. That being so, review of the Order with reference to admissibility of taxes is not necessary.

III. Foreign exchange losses

The Authority's Order

The NSICT claim for a return on investment on the foreign exchange loss pertaining to the unamortised foreign currency loans considering the variation of foreign exchange rate cannot be said to be correct. The NSICT can claim for the losses due to variation of foreign exchange rate only in respect of the foreign currency repayable during the year.

NSICT's Comments

(i). Unrealised foreign exchange losses arising from foreign currency transaction which pertain to capital expenditure should be capitalised and depreciated over the remaining useful life of the estate as per the

Indian Accounting Standard. The International Accounting Standard states that the unrealised foreign exchange losses are required to be charged to the profit and losses account.

(ii). The NSICT has followed the practice as prescribed by the International Accounting Standard as it will reflect a true picture of the state of affairs.

(iii). In the case of the approach followed by the Authority and given the NSICT's loan repayment pattern major exchange losses will arise and have an impact in year 7 of the loan thereby making the tariff fixation in that year unrealistic.

(iv). The NSICT for arriving at tariff fixation is willing to adopt the approach prescribed in the Indian Accounting Standard. The Authority may reconsider its stand and approve this approach.

Comments of M/s. Arthur Andersen

(i). The accounting treatment to be followed by Indian companies in respect of foreign currency transactions and resultant foreign currency position is prescribed by Accounting Standard 11 (AS-11) issued by the Institute of Chartered Accountants, India.

(ii). In terms of AS-11, where the foreign currency loan was applied for the purpose of acquisition of a fixed asset, the difference arising from restatement of loan is required to be adjusted in the carrying amount of the concerned fixed asset.

(iii). The regulatory framework in other sectors provides two alternative bases for recognising exchange rate differences –

(a). at each year end in accordance with AS-11; or,

(b). at the time of repayment of loan.

(iv). The AS-11 treatment will give a more accurate picture of the state of affairs of the entity. The AS-11 treatment will enable the entity to separate the effect of exchange rate depreciation over the treatment of loan.

(v). Recognition of exchange rate differences on repayment can have potentially a large financial impact in a single year which can result in a sharp increase in cost base charges for consumers (if permitted by the regulator) or non-recovery of business related costs by the entity (if the regulator disallows pass through of the exchange losses).

(vi). Since the treatment as per AS-11 will spread over the effect of exchange rate losses over the useful life of fixed assets, this approach

will shield the customers from sharp and potentially volatile changes in the cost base.

Analysis

The NSICT being an Indian company is required to follow Indian Accounting Standards issued by the Institute of Chartered Accountants of India. They have not, however, followed the AS-11. While submitting estimates along with their tariff revision proposal, the NSICT did not follow the Indian Standards and has charged the entire difference of restatement of loan to the P&L accounts as losses on account of foreign exchange fluctuation. This Authority had, however, allowed loss due to foreign exchange fluctuation on the instalment of loan repaid / repayable during the relevant years.

The report of M/s. Arthur Andersen specifically mentions that regulatory framework in other sectors provides for recognising exchange rate differences at the time of repayment of loan also.

The NSICT did not follow the Indian Accounting Standards; but, it has now requested this Authority to approve the Indian Accounting Standards so that it can adopt such a method. There is no need for this Authority to advise the NSICT on its accounting procedure. It has to maintain its accounts based on the system accepted for Indian companies. The NSICT was not advised by this Authority earlier to submit its estimates by methods other than the Indian Accounting Standard. Even the approach adopted by this Authority cannot be said to be wrong in the light of the comments furnished by M/s. Arthur Andersen.

If the NSICT revises its accounting procedure, this Authority may also consider appropriately for a prospective application at that time about treatment of loss on restatement of foreign currency loan for the purpose of determining tariff. Since this is relevant for future revisions, and considering the fact that a review cannot be made with reference to experiences gained or changes to be made subsequent to the Order, there is no merit in the NSICT argument for review of our Order with reference to the issue of foreign exchange loss.

Even though it is not directly relevant to this review petition, the CSLA's observation about dollarisation of tariff needs to be dealt with here to remove its misconception. Even in respect of those dollarised tariff items at the NSICT, the future income projections have been considered accounting for estimated appreciation of the US Dollar vis-à-vis the Indian Rupee. If this approach can be applied for Income projections, there is no reason why the same principle cannot be applied for estimating expenditure. There is a definite cash outflow due to loss in foreign exchange fluctuation relating to foreign currency loan repayment and this has been recognised in the cost estimates. Only in the case of equity, such method is not adopted since rate of return on equity has been fixed with reference to Indian capital market expectation. Considering the effect of foreign exchange fluctuations both in

the estimates of income and expenditure can not be said to amount to 'dollarisation' of tariffs.

IV. Return on capital employed

The Authority's Order

(i). The capital structure of the major ports and the private terminal operators are not similar.

(ii). Development of an alternate approach relevant to BOT projects may have to be handled as part of a separate study with a long-term perspective. That being so, an interim approach has necessarily to be adopted to dispose off the NSICT proposal.

(iii). The interim approach adopted is to allow the cost of respective sources of capital accepting the 1:1 debt equity ratio obtaining in the NSICT case.

(iv). The cost of different sources of funds procured by the NSICT allowed as return on investment is as follows:

(a). debt : actual interest payable during the year.

(b). Preference shares : the adopted rate of dividend payable i.e. 14%.

(c). Equity shares : The TRAI is considering 20% equity in return of equity for tariff setting. Studies conducted by experts e.g. CRISIL, Price Water House Cooper on the subject of cost of capital also pitch this figure at or around 20%. That being so, a return on equity of 20% is allowed.

(v). The return on equity allowed is a pre-tax return.

NSICT's Comments

(i). In the NSICT case, the Authority adopted a different approach deviating from the ROCE approach followed in the case of Major Port Trusts and other private operators. The interim basis adopted by the Authority is arbitrary and to the detriment of the NSICT.

(ii). The Authority has not followed its own consultative approach principle in this matter and has thus not given an opportunity to the private investors to offer their views.

(iii). Allowing a pre-tax return based on cost of capital to private terminals and post-tax return to Port Trusts based on capital employed is unfair and does not contribute to the overall objective of providing a level playing field among different operators.

(iv). Cost of capital differs from return on capital. Return on capital involves an element of expected profit over and above the cost of capital.

(v). NSICT has not had the privilege of relating to the studies conducted by the CRISIL and PWC. The Authority may share these findings with the NSICT.

(vi). The cost of the debt of the NSICT is lower because this debt has been guaranteed by P&O Australia Ltd. By guaranteeing this debt without any charge to the NSICT, it is fair that the investor should be eligible to a return, which is being denied by the Authority.

(vii). Retained earnings should be treated as component of shareholders' fund. These earnings are reinvested into the business. These retained earnings are a component of the net worth of the business and are entitled to a return.

(viii). The Authority may review its interim approach and, till such time the Authority frames a transparent, objective and universally accepted principle, the NSICT may be allowed a return of 20% on capital employed.

Comments of M/s. Arthur Andersen

(i). A reasonable return on capital will be that which has regard to the opportunity cost of funds and the business risks undertaken. The regulatory rate of return on capital is set, based on these considerations as well as the need to attract investment in the sector, the social and development objectives of the Govt. and other factors.

(ii). (a). In power transmission and distribution sector, 16% post-tax return is allowed on the capital base of fixing assets plus normative level of cash and stores less long term debt and special reserves.

(b). In the power generation sector, 16% post-tax return is allowed on equity and free reserves utilised for meeting capital expenditure of generation project. In case of foreign equity, 16% return is allowed in the currency of subscribed capital.

(c). The TRAI allows a return of 25 – 30% on capital employed, which is a sum of net worth and debt investment in net worth component and related assets.

(d). In case of the controlled bulk drugs manufacturing sector, the manufacturer can choose to apply for 22% pre-tax return on capital employed or 14% post tax return on net worth (net worth is the sum of equity and free reserves less outside

investment; capital employed is the sum on net fixed assets and working capital).

(iii). Foreign investors generally prefer some form of protection from the expected currency depreciation in the value of their investment. This can be achieved either through pass– through of the foreign equity arising on restatement of their equity or by indexation of the allowabale return on the foreign equity to the US$ / Indian rupee exchange rate. The latter approach has been allowed in the case of power generating companies in respect of foreign equity capital.

(iv). Generally, investors prefer to earn a post-tax return to remove uncertainties arising from income tax regulations. An upward revision of income tax rate or introduction of a new tax when corresponding change in the allowable rate of return can adversely impact the return expectation of an investor in a rate regulated industry.

Analysis

It is true that this Authority veered away from the ROCE model adopted in the case of Major Port Trusts to a specific itemised return on respective sources of funds in the case of Private Terminal Operators. The deviation is made for reasons stated in paragraph 9 (xiii) of our Order. The method adopted is not arbitrary but with complete application of mind and reasoning.

The argument of the NSICT that the rate of interest on its borrowings is low because the P & O Australia has guaranteed the debt without any charge to the NSICT is not relevant. Scrutiny of the P & O Australia's bid for the Terminal was based on its financial standing. The NSICT was a later creation. The P & O Australia was expected to arrange for debt finance; and, there is nothing special that it has done which was not expected of it.

Retained earnings, as mentioned in the report of M/s. Arthur Andersen, are considered for allowing return in other sectors only if they are invested in the assets of the Project. This Authority has never held that retained earnings will not quality for return. In the case of NSICT, even the debt and equity capital do not stand fully invested in the assets of the Project. That being so, the question allowing return on Retained Earnings does not arise at all.

Return on Preference share has been allowed at the rate adopted by the NSICT itself.

Equity shares have been allowed a pre-tax return of 20% which compares well with the ROCE of 19.5% (net of interest on loans) allowed in the cases of Major Port Trusts. The reasonable return on equity has been arrived at on the basis of capital market expectations reported by leading financial consultants in the country. The 20% pre-tax return on equity allowed works out to about 17% post-tax return according to the NSICT's own calculations. This cannot be claimed to be unfair or unreasonable when compared to the allowable

return on equity in other sectors reported by M/s. Arthur Andersen. M/s.Arthur Andersen report that TRAI allows a 30% pre-tax return; the factual accuracy of this observation is not certain. The TRAI has indicated to us that it allows only a 20% return on equity, that too on an industry-specific assessment and not investor-specific. The TRAI allows an annual recurring expenditure @ 22% to 24% of capital investment. This includes a provision of 10% towards depreciation. It is to be recognised that in the case of the NSICT, depreciation has been allowed as a separate item of cost and over and above this a return on equity of 20% has been reckoned with.

The NSICT's argument about equity contribution from foreign investors and depreciation of Indian rupee allowing them a return of around 9% (with tax holiday) are irrelevant. It is to be recognised that 20% pre-tax return has been fixed with reference to Indian capital market expectations on Rupee investment. It is needless to mention that if the currency base is changed, the rate of return is also to be adjusted.At this stage of development, it may be over optimistic to expect a return of 20% on US$ equity. We are not sure whether (even) the US capital market offers such a level of return in infrastructure projects.

The issue of debt : equity ratio for a review is not relevant at all. The ratio of 1 : 1 has been allowed taking the position obtaining in the NSICT. It is true that the ratio will vary gradually with debt being serviced periodically. It is to be recognised that the cash inflow for such debt servicing is mainly from tariffs. This means the user is contributing towards repayment of loans also. That being so, a mere fact that loans have been serviced cannot alter the position as far as allowing a return is concerned. It is also to be recognised that allowing a return on investment based on the sources of capital without prescribing a prudential norm of capital mix cannot be said to be logical. While a Private Terminal can have a capital mix of its choice, the norm prescribed by this Authority will only be recognised for allowing Return on Investments.

It is to be admitted again that an opportunity was not given to the NSICT to put forth its views on the Return on Investment approach adopted. But, this lapse also has now been corrected by holding a joint hearing on this point at the MBPT on 3 September 2001. This opportunity was utilised for consulting the other concerned organisations for also developing a further refined model. Insofar as the review is concerned, the following two issues are relevant:

(i). Whether the distinction made between the Private Terminals and Major Port Trust for allowing return is justified.

(ii). Whether the quantum of pre-tax return on equity allowed is reasonable.

The issue about reasonableness of the return on equity allowed in the case of the NSICT has already been discussed elaborately in the foregoing

paragraphs. The return allowed cannot be said to be unreasonable considering the Indian market conditions.

The capital structures of Private Terminals and Port Trusts do not compare. The old port trusts still report asset valuation (particularly, land) at historic cost based on valuation at the time of acquisition.There is no equity component in their structure. They do not distribute dividend; but, retained surplus is utilised for future development. They have also to create assets to fulfil social obligations. While the major ports finance assets through loans and internal resources, the private terminals raise funds through debt and equity. The cost of different sources of capital is easily identifiable in the case of private operators.

In spite of these differences, it has already been decided by this Authority to review the present method of allowing Return on Capital Employed for the Port Trusts. As has been pointed out by the CSLA,there is no justification in extending such a method, which essentially requires modification, to the Private Terminals. Significantly, the Private Terminal Operators like the PSA SICAL and the ABG have not suggested anything about applying the Return on Capital Employed model to them. They have only suggested some modifications in the model followed in the NSICT case. In view of the differentiation in the capital structures, different models of allowing return is justified in the cases of the Private Terminals and Major Port Trusts. As has already been mentioned, the matter relating to a review of the existing model for Major Port Trusts is progressing separately.

The comments offered by the CSLA and the MANSA do not suggest any change in the method adopted by this Authority.

In this issue, again, there is no error apparent on the face of the record. The NSICT has only challenged the approach adopted by this Authority in the case of Private Terminals deviating from the method followed in the cases of Port Trusts. The reasons for such deviations have already been elaborated in this Authority's Order dated 7 November 2000. If the NSICT does not agree with the approach adopted, it has to seek remedy from other forums. For these reasons, there is no need for this Authority to review its Order with reference to the approach adopted in this regard.

V. Capacity utilisation and return on equity

The Authority's Order

(i). Even though the NSICT has fully injected the capital required to achieve the capacity of 6.5 million TEUs (as envisaged in the Concession Agreement), the average capacity utilisation for the years 2000-01 and 2001-02 is around 82%.

(ii). Not only in port projects, but in relation to investment in any project, the investors do not reasonably expect to get a return at the maximum right from the start.

(iii). Only 80% of the maximum return on preference and equity shares, considering the average capacity utilisation of the terminal during the period under review, is allowed.

NSICT's Comments

(i). The NSICT has guaranteed a traffic of 600000 TEUs per annum which is expected to be achieved in the 15th year of the concession period (Appendix X of the Concession Agreement).

(ii). The NSICT while accepting the Authority's decision on restricting return to capacity utilisation requests to revise the figure of 6.5 million TEUs to 6.0 lakh TEUs per annum. Based on this figure the average capacity utilisation will be 89.43%.

(iii). The Authority should adopt an approach of reward when additional investments over and above the required investments yield additional capacity.

Comments of M/s. Arthur Andersen

(i). Capacity utilisation is a function of several demand and supply factors and some of the factors can sometimes be outside the control of the regulated entity.

(ii). In the Telecom Sector, the TRAI has allowed basic and cellular service providers a return on capital investment without, prima facie, linking return to expected network capacity utilisation. Similarly,transmission and distribution utilities in Power Sector are allowed a return without reference to capacity utilisation.

(iii). In the Power Generation Sector, while recovery of charges is linked to capacity, the following basis has been adopted:

(a). The base level for full recovery of fixing charges has been set through the tariff notification and committed in the power purchase agreement.

(b). Incentives are provided for availability over and above the base level.

(c). The utility is protected from non – off take of declared availability arising from certain events beyond its control.

Analysis

The Report of M/s. Arthur Andersen indicates that linking capacity with allowable return on investment for the purpose of tariff determination is in existence in the Power sector where tariffs are regulated. Even the NSICT itself has accepted the principle of linking return to capacity utilised.

Even though only a capacity of 6.5 lakh TEUs has been considered in our calculations; due to a typographical error it has been mentioned as 6.5 million TEUs in our Order. This typographical error does not, however, affect the calculation of the tariff increase. Nevertheless, this error will have to be corrected.

Even though the throughput guaranteed as per the Concession Agreement is 6,00,000 TEUs, the NSCIT in its letter dated 3 August 2000 has indicated the capacity as 8.5 lakh TEUs after certain additional equipment are added. The 30-year projection given by the NSICT indicates a throughput of 6.5 lakh TEUs for 2002-03 rising to 8.5 lakh TEUs in 2005-06. That being so, there is no need to revise the percentage of capacity utilisation considered. On the contrary, if addition to the Capital Block projected for 2000-01 and 2001-02 is on account of acquisition of additional equipment to build a capacity of 8.5 lakh TEUs, the percentage of capacity utilisation considered earlier in our Order may have to be reduced.

It is relevant here to mention that if the NSICT wants to stick to the capacity envisaged under the CA, then the quantum of capital investment to be considered for tariff purposes should also be linked to the requirements stipulated thereunder. There is no doubt that the NSICT has added more number of equipment and created additional facilities than those given in the CA. It will be a mismatch to the level of being called a blunder if actual investment made is considered along with the minimum level of capacity envisaged in the CA.

VI. <u>Deduction of excess cash</u>

<u>The Authority's Order</u>

(i). The estimates furnished by the NSICT show a huge cash and bank balance during the year 2000-01. This balance is far in excess of reserve funds.

(ii). Since excess cash holding represents idle capital, the cash balance in excess of reserve funds is excluded while reckoning with the return on preference and equity share.

<u>NSICT's Comments</u>

(i). The Authority has deducted the excess cash based on the NSICT application for a 30% tariff increase without considering the effect of reduced tariff level approved, the tax and dividend paid out.

(ii). The cash balance should be re-worked based on 16% increase approved and then arrived at considering the impact of payment of taxes and dividends to the share holders.

(iii). Considering the year end cash balance is not a true reflection of the correct position, the better practice will be to adopt an average of opening and closing balances of cash to ensure equalisation.

(iv). Cash balances do not earn return exceeding 8% at the maximum flows with fix deposit in banks. The NSICT suggests that an interest earning at 10% on cash balance be adopted by the Authority of 65% of the average cash balance, which will reflect an adequate return on cash.

Analysis

Since the year-end balances of debt and equity have been considered for allowing return, deduction of year-end unutilised cash balance is in order. In the long run, considering average balance or year-end balance may not make any material difference. Incidentally, closing balance of capital employed including working capital is considered in the case of Major Port Trusts also.

The amount of unutilised cash balance deducted is in fact based on the indications given by the NSICT in the 30-year projection, which assumes a 30% increase in tariff as per tariff application. This may become less with the 16% increase allowed. However, this may not materially affect the increase in tariff allowed as the percentage of revision allowed is higher than the actual deficit disclosed by the cost statement. Further, reduction of excess cash balance is not a new practice adopted by this Authority only in the case of the NSICT. The figure of working capital has been moderated to a reasonable level in the cases of tariff revision of many of the Major Port Trusts.

The issues raised by the NSICT for allowing 8% interest on cash balance, etc., are not relevant. It is to be recognised that in the case of the NSICT, this Authority did not adopt the conventional method of determining return on capital employed (Fixed Assets + Working Capital). The return allowed for the NSICT was with reference to sources of fund; and, in this context, excess cash reflected funds not invested in operation and, was therefore, deducted. This approach has only been adopted for the purpose of determining tariff. This does not mean this Authority has not recognised the ability of Balance Sheet Management of the NSICT.

VII. 30-year period analysis

The Authority's Order

(i). The 30-year analysis made keeping the tariffs constant is not appropriate.

NSICT's Comments

(i). The calculations, as mentioned in the Order, are only theoretical and hypothetical as rightly observed by the Authority.

(ii). The Authority should review each application for the 2-year period as prediction. Estimates for a 30-year period really serve no purpose in pricing decision. These decisions apart from demand and supply are also influenced by macro-economic factors.

Analysis

The tariff increase allowed in the NSICT case is based on projections for the following two years considered at that time. The 30-year analysis is only an aid to the decision-making process as it can throw up some meaningful indicators (for instance, in this case, the capacity of the Terminal). The observation of the NSICT in this regard is general in nature and does not warrant a review of our Order.

VIII. Adjustment in future tariff

The Authority's Order

The tariff and income projections furnished by the NSICT have been relied upon without any modifications. If this approach seems to have given any undue advantage to the Terminal Operator, at the time of review during the next revision of tariffs, any undue benefit accrued to the terminal operator will be set off against the future revision of tariffs.

NSICT's Comments

The Authority should also accept the principle that adverse changes which affect the financial stability and return of the NSICT will also be considered.

Comments of M/s. Arthur Andersen

(i). As cost based tariffs are developed from estimates of cost, changes in actual costs of given inputs can adversely impact the financial position of the regulated entities and the sector as a whole.

(ii). In some sectors, such as power, the regime has a mechanism to compensate utilities for justifiable increase in fuel cost over previously projected levels either through indexation mechanisms or future tariff revisions.

Analysis

If any of the planning premises undergoes adverse change with reference to the estimates made by the Operator, he will always have the option to seek an ahead-of-schedule tariff adjustment. Incidentally,the November 2000 revision of the NSICT tariff was an ahead-of-schedule one which was allowed based on the NSICT's plea for having its tariff with reference to its own cost of operation instead of continuing with the rates adopted from the Jawaharlal Nehru Port Trust's Scale of Rates.

If variations in the estimates are favourable to the Operator, it is likely that he may not come up with a proposal to review the approved tariffs in the context of the benefit accrued to him on account of such variations. It was in this backdrop that the reference was made about such advantages being set off against future accruals.

In any case, this issue does not affect the tariff increase allowed in November 2000. That being so, it is not relevant for a review of the Order.

IX. Application of a uniform basis of tariff determination for different Operators

NSICT's Comments

(i). The Authority has always stated and maintained that its approach towards tariff fixation will be a consultative process. NSICT supports this stand in this matter but request that it may also be given a similar opportunity to make representations when the Authority departs from the established practices.

(ii). In the impugned Order, the Authority has implemented a whole new set of financial parameters on which the NSICT has never been asked for its representation. The Authority has also implemented the scheme (ELT) on which the NSICT was not asked for its views.

(iii). The Authority should adopt an approach which is practical. Such an approach should also consider realities and also practices prevalent in the industry. Till date, the TAMP in general followed accepted principles in the case of major ports, but has chosen to deny benefits of dollar tariff to the NSICT and further impose an ELT scheme which is far more stringent than the Concession Agreement requirements and also adopt financial parameters for evaluating the NSICT proposal which are not universally used parameters.

Comments of M/s. Arthur Andersen

(i). In general, the TAMP has applied a uniform set of parameters across all operators / Port Trusts.

(ii). In some instances, however, the TAMP appears, prima facie to have adopted a different basis in the determination of cost base charges for other ports / operators vis-à-vis the NSICT. The differences relate to

(a). Allowing other operators a return on total capital employed as opposed to a return on paid up capital for NSICT.

(b). Reducing the NSICT's return on capital to the extent of estimated capacity utilisation.

(c). Linking NSICT's charges to tariffs in terms of moves per hour.

These differences have the effect of reducing NSICT's cost base / allowable return for development of cost base charges.

Analysis

Out of the three issues mentioned by M/s. Arthur Andersen, the point about ELT scheme has lost its relevance now since this Authority has already rescinded the ELT Scheme introduced vide our Order dated 7 November 2000. The other issues have been dealt with in the analysis given under the respective heads.

9. In the light of the analysis given above there is no error apparent on the face of the record warranting a review of our Order dated 7 November 2000. As has already been mentioned, the issues agitated by the NSICT are in support of a totally new approach to tariff setting in the case of the Private Terminals. That is a different matter altogether. The approach adopted by this Authority in the case of the NSICT does not require any modification with reference to the points agitated. If the NSICT is not satisfied with the approach adopted by this Authority, it has to approach other appropriate forums for redressal of its grievances. That being so, this Authority does not find it necessary to review and modify the approach already prescribed by it in the NSICT case.

10. In the result, and for the reasons given above, and based on a collective application of mind, this Authority rejects the application of the NSICT for a review of this Authority's Order dated 7 November 2000 relating to revision of its tariff.

11. Notwithstanding the decision not to review the earlier Order dated 7 November 2000 in this case, this Authority, nevertheless, recognises some issues arising out of this proceeding need to be addressed further for refining the approach adopted for prospective application. The Port Sector in our country is undergoing a transition in the sense that private terminals have begun to emerge in a big way. New models will have to be developed to suit emerging requirements. In any transition situation, this will have to be a continuing exercise for sometime; it will not be reasonable to expect readymade solutions for immediate adoption.

(**S. Sathyam**)

Chair

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